STATE OF MICHIGAN

COURT OF APPEALS

JONATHON MOORE,

Plaintiff-Appellee,

v

CITY OF FLINT,

Defendant-Appellant.

UNPUBLISHED
May 4, 2004

No. 245027
Genesee Circuit Court
LC No. 2001-069767-CZ

Before: O'Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying its motion for summary disposition of plaintiff's claims for discrimination and retaliation under the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.* We reverse.

Plaintiff was formerly employed by defendant as an internal auditor. Plaintiff suffers from arthritis of the spine, which, according to plaintiff, causes him severe stiffness in the morning upon waking. Due to this condition, plaintiff was often unable to report to work at his designated starting time, and frequently was absent. Plaintiff was repeatedly disciplined throughout his employment, due in large part to his inability to meet the work and attendance requirements. In 1999, plaintiff 's tardiness was temporarily accommodated by defendant, which allowed him to work later hours in order to make up the time he missed after arriving late. In March 2000, plaintiff filed a complaint with the Equal Employment Opportunity Commission (EEOC), charging defendant with discrimination. That charge was dismissed in December 2000, and plaintiff filed this lawsuit in February 2001. In 2002, defendant hired a new finance director, who became plaintiff's new supervisor.

In the present action, plaintiff alleges that, after filing the EEOC complaint, defendant was no longer willing to accommodate his disability, and began a progressive pattern of disciplinary actions against him, primarily due to his tardiness and absenteeism. Plaintiff alleged counts for both discrimination and retaliation under the PWDCRA.

Defendant first argues that the trial court erred in denying its motion for summary disposition of plaintiff's discrimination claim under the PWDCRA. We agree that summary disposition of this claim was warranted pursuant to MCR 2.116(C)(10).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

In our de novo review of the record, we conclude that plaintiff failed to submit sufficient evidence to establish a genuine issue of material fact regarding whether he was discriminated against within the meaning of the PWDCRA. As this Court stated in *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999):

> To establish a prima facie case of discrimination under the [PWDCRA], a plaintiff must show that (1) he is "disabled" as defined by the statute, (2) the disability is unrelated to the plaintiff's ability to perform the duties of a particular job, and (3) the plaintiff has been discriminated against in one of the ways set forth in the statute.

The PWDCRA defines "disability" as follows:

> (i) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:
>
> (A) For purposes of article 2, substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion. . . . [MCL 37.1103(d).]

At his deposition, plaintiff testified that he would not know whether he could go to work, or go into work late, until he woke up in the morning and assessed how much pain he was in each day. As such, plaintiff admittedly reported late for work, and missed work completely, repeatedly throughout his employment. According to his supervisors, plaintiff's erratic schedule caused problems in the office because someone else had to assume plaintiff's duties if he was absent.

As indicated by defendant, it is well-settled that a person who cannot appear for work on a reasonably regular and predictable schedule is not able to perform the essential duties of his job and, therefore, is not disabled within the meaning of MCL 37.1103(d)(i). Cf. *Jovanovic v In-Sink-Erator Div of Emerson Electric Co*, 201 F3d 894, 899-900 (CA 7, 2000); *Gantt v Wilson Sporting Goods Co*, 143 F3d 1042, 1047 (CA 6, 1998); *Jackson v Veterans Admin*, 22 F3d 277, 278-279 (CA 11, 1994); *Barfield v Bell South Telecom, Inc*, 886 F Supp 1321, 1326-1327 (SD Miss, 1995). As the court explained in *Haschmann v Time Warner Entertainment Co, LP*, 151 F3d 591, 602 (CA 7, 1998),

> it is not the absence itself but rather the excessive frequency of an employee's absences in relation to that employee's job responsibilities that may lead to a finding that an employee is unable to perform the duties of his job.

Although consideration of the degree of excessiveness may in some cases present a factual issue for the jury, *id.*, the undisputed evidence in this case demonstrates that there is no genuine issue of material fact that plaintiff was excessively absent from work and was not able to work a reasonably regular schedule due to his arthritis.[1] Further, defendant demonstrated that plaintiff's repeated absences affected its operations. The work needed to be performed by someone else if plaintiff was absent, and defendant incurred overtime and other expenses in order to complete the work.

We also reject plaintiff's argument that defendant may reasonably accommodate his condition by allowing him to work later hours in order to make up for missed time, thus causing him to fall within the statutory definition of "disability." MCL 37.1103(d)(i)(A) and (1)(i). Although such an accommodation would partially address the tardiness problem, it would not become a solution for plaintiff's excessive absenteeism. Plaintiff failed to show that this suggested accommodation would allow him to make up enough time for the excessive number of days of missed work. Such unpredictable absences can create an undue hardship on employers. In *Jackson, supra* at 279, the court held that an employer was not required to accommodate the plaintiff's unpredictable absences due to his arthritis because it created an undue hardship on the employer to find someone to do the plaintiff's work on short notice. While an employer has a duty to accommodate an employee's disability, the evidence in this case established that the proposed accommodation was unreasonable and unduly burdensome. *Rourk v Oakwood Hosp Corp*, 458 Mich 25, 28; 580 NW2d 397 (1998).

In this case, plaintiff failed to raise a genuine issue of material fact that he was disabled because he was not able to perform the essential functions of the job, with or without a reasonable accommodation. Moreover, because plaintiff was not disabled, defendant had no independent statutory duty to accommodate plaintiff. MCL 37.1210. Accordingly, defendant was entitled to summary disposition on plaintiff's discrimination claim, and the trial court erred in concluding otherwise.

Defendant next argues that the trial court erred in denying its motion for summary disposition of plaintiff's retaliation claim. We agree.

To establish a prima facie case of retaliation under the PWDCRA, a plaintiff must prove the following:

> "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an . . . action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse . . . action." [*Bachman v Swan Harbour Assoc*, 252 Mich App 400, 435; 653 NW2d 415 (2002), quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

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[1] Plaintiff asserts that several of his absences from work were attributable to suspensions and a medical leave of absence for hip replacement surgery. We have not considered those absences in deciding this issue.

Defendant argued below that plaintiff could not establish the fourth element, a causal connection between the protected activity and the alleged adverse employment action. In a case involving retaliation under the analogous retaliation provision of the Elliott-Larsen Civil Rights Act, MCL 37.2701(a), this Court held that in order to establish a causal connection, the plaintiff must show that his participation in the protected activity was a "significant factor" in the employer's adverse employment action, not merely that there was a causal link between the two events. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001).

In denying defendant's motion on the retaliation claim, the trial court ruled as follows:

> With respect to the retaliation claim, the Defendant raises the position–or raises the point that timing cannot be used exclusively to show the causal connection. But, in this case, I think an argument can be made that it is more than just the timing. I think it is admitted a little bit that there was some tolerance in an effort to work out these issues prior to the filing of the complaint, and, then, subsequent to the filing of the complaint, there were discipline issues not only related to the timing but they were also, arguably, related to the level of tolerance that would be permitted. So it's more than just that discipline began after the filing of the EEOC complaint, there is also an issue raised on these fact that there was less tolerance than before, which, in my view, creates an issue of fact as to whether or not there was a causal connection.

We disagree with the trial court's conclusion. In *West v General Motors Corp*, 469 Mich 177, 184-187; 665 NW2d 468 (2003) our Supreme Court analyzed what proofs are necessary to establish a "causal connection" between protected activity and an adverse employment action. In doing so, the Court concluded that a plaintiff "must show something more than merely a coincidence in time between protected activity and adverse employment action." *Id.* at 186. Importantly for this case, the Court held that "[t]he fact that a plaintiff engages in 'protected activity' under the Whistleblowers' Protection Act does not immunize him from an otherwise legitimate, or unrelated, adverse job action." *Id.* at 187.[2]

The material facts in the record show that plaintiff filed his EEOC complaint on March 8, 2000, and that defendant knew about it, at the latest, in April 2000. The undisputed material facts also reveal that since 1994, plaintiff received innumerable and varying forms of discipline for his excessive tardiness and absenteeism. For example, in 1994, plaintiff was disciplined eight times for tardiness or absences (eleven times in total), ranging from written warnings to a thirty-two-hour suspension. In 1995, plaintiff was disciplined fives times for tardiness and absences, and seven times overall. In October 1997, plaintiff was hired by defendant's finance department, and was supervised by Sekar Bawa. In 1998, plaintiff was disciplined seven times for tardiness and absenteeism (eight times overall), ranging from oral reprimands to twenty-four-hour suspensions. In 1999, when defendant was attempting to work through defendant's

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[2] Although *West* was a case brought under the Whistleblowers' Act, the Court noted that whistleblower claims are analogous to antiretaliation discrimination cases. *West*, *supra* at 186 n 11.

attendance issues, plaintiff was disciplined only once, for forty hours, and received one other written warning for insubordination and neglect of duty. In 2000, plaintiff was disciplined fifteen times for tardiness or absenteeism. In his deposition, plaintiff admitted that the two incidents that occurred in April and May were correct, and regarding the remaining thirteen incidents, plaintiff failed to rebut defendant's evidence that the infractions actually occurred.

In light of the foregoing, we conclude that there was no genuine issue of material fact that plaintiff's filing of his EEOC charge was not a significant factor in his discipline. *West, supra*; *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 661-662; 653 NW2d 625 (2002). The record indisputably shows that plaintiff had a long history of discipline for tardiness and absenteeism, dating back to 1994. And, although the number of times plaintiff was disciplined increased in 2000, timing is not enough to establish a causal connection, *West, supra*. Further, plaintiff has failed to show that these disciplines were not proper, i.e., that he was incorrectly disciplined on these occasions. *Id.* Indeed, at oral argument before this Court, plaintiff's counsel conceded that no evidence existed in the record to show that, after he engaged in protected activity, plaintiff was disciplined for something he did not in fact commit. Absent such proof, or proof that plaintiff was treated differently than other similar employees, we cannot conclude that there was a genuine issue of material fact that plaintiff's EEOC complaint was a significant factor in these legitimate disciplines.[3]

Reversed and remanded for entry of an order granting defendant's motion for summary disposition. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray

[3] Although plaintiff did not file a brief on appeal, he filed an affidavit in the trial court. In that document, plaintiff stated that his supervisor made personal telephone calls lasting thirty minutes or more, yet "to the best of his knowledge," his supervisor was not disciplined. Plaintiff was disciplined for excessive use of the telephone. However, in discrimination cases, a plaintiff cannot generally compare his treatment with that of his supervisor. See *Ercegovich v Goodyear Tire & Rubber Co*, 154 F3d 344, 352 (CA 6, 1998); *Mitchell v Toledo Hosp*, 964 F2d 577, 583 (CA 6, 1992). Here, plaintiff only offers speculation on whether his supervisor was, or was not, disciplined. Likewise, the affidavit does not raise a genuine issue of material fact regarding the remaining discipline received by plaintiff, as the assertions in the affidavit lack sufficient specificity to raise a genuine issue of material fact.